



## **LIBRARY OF CONGRESS**

### **Copyright Office**

### **37 CFR Part 201**

**[Docket No. 2018-8]**

### **Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited**

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Notice of inquiry.

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**SUMMARY:** The U.S. Copyright Office is issuing a notice of inquiry regarding the Classics Protection and Access Act, title II of the recently enacted Orrin G. Hatch–Bob Goodlatte Music Modernization Act. In connection with the establishment of federal remedies for unauthorized uses of sound recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”), Congress also established an exception for certain noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. To qualify for this exemption, a user must file a notice of noncommercial use after conducting a good faith, reasonable search to determine whether the Pre-1972 Sound Recording is being commercially exploited, and the rights owner of the sound recording must not object to the use within 90 days. To promulgate the regulations required by the new statute, the Office is soliciting comments regarding specific steps that a user should take to demonstrate she has made a good faith, reasonable search. The Office also solicits comments regarding the filing requirements for the user to submit a notice of noncommercial use and for a rights owner to submit a notice objecting to such use.

**DATES:** Initial written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Written reply comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. Rather than reserving time for potential extensions of time to file comments, commenting parties should be aware that the Office has already established what it believes to be the most reasonable deadlines consistent with the statutory deadlines by which it must promulgate the regulations described in this notice of inquiry.

**ADDRESSES:** For reasons of government efficiency, the Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at <https://www.copyright.gov/rulemaking/pre1972-soundrecordings-noncommercial/>. If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at [regans@copyright.gov](mailto:regans@copyright.gov), Anna Chauvet, Assistant General Counsel, by email at [achau@copyright.gov](mailto:achau@copyright.gov), or Jason E. Sloan, Assistant General Counsel, by email at [jslo@copyright.gov](mailto:jslo@copyright.gov). Each can be contacted by telephone by calling (202) 707-8350.

**SUPPLEMENTARY INFORMATION:**

## **I. Background**

On October 11, 2018, the president signed into law the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, H.R. 1551 (“MMA”). Title II of the MMA, the Classics Protection and Access Act, created chapter 14 of the copyright law, title 17, United States Code, which, among other things, extends remedies for copyright infringement to owners of sound recordings fixed before February 15, 1972 (“Pre-1972 Sound Recordings”). Under the provision, rights owners may be eligible to recover statutory damages and/or attorneys’ fees for the unauthorized use of their Pre-1972 Sound Recordings if certain requirements are met. To be eligible for these remedies, rights owners must typically file schedules listing their Pre-1972 Sound Recordings (“Pre-1972 Schedules”) with the U.S. Copyright Office (the “Office”), which are indexed into the Office’s public records.<sup>1</sup> The filing requirement is “designed to operate in place of a formal registration requirement that normally applies to claims involving statutory damages.”<sup>2</sup>

The MMA also creates a new mechanism for the public to obtain authorization to make noncommercial uses of Pre-1972 Sound Recordings that are not being commercially exploited. Under section 1401, a person may file a notice with the Copyright Office and propose a specific noncommercial use after taking steps to determine whether the recording is, at that time, being commercially exploited by or under the authority of the rights owner.<sup>3</sup> Specifically, before determining that the recording is not being commercially exploited, she must first undertake a “good faith,

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<sup>1</sup> 17 U.S.C. 1401(f)(5)(A)(i)(I)–(II).

<sup>2</sup> H.R. REP. NO. 115-651, at 16 (2018); *see* S. REP. NO. 115-339, at 18 (2018).

<sup>3</sup> 17 U.S.C. 1401(c)(1)(A)–(B).

reasonable search” of both the Pre-1972 Schedules indexed by the Copyright Office and music services “offering a comprehensive set of sound recordings for sale or streaming.”<sup>4</sup> At that point, she may file a notice identifying the Pre-1972 Sound Recording and nature of the intended noncommercial use with the Office (“Notice of Pre-1972 Noncommercial Use”).<sup>5</sup> The Office will index this notice into its public records.<sup>6</sup>

In response, the rights owner of the Pre-1972 Sound Recording may file a notice with the Copyright Office “opting out” of (*i.e.*, objecting to) the noncommercial use (“Pre-1972 Opt-Out Notice”), and if the user nonetheless engages in the noncommercial use, such use may subject the user to liability under section 1401(a) if no other limitation on liability applies.<sup>7</sup> The rights owner of the Pre-1972 Sound Recording has 90 days from when the Notice of Pre-1972 Noncommercial Use is indexed into the Office’s public records to file a Pre-1972 Opt-Out Notice.<sup>8</sup> If, however, the rights owner does not opt-out within 90 days, the user may engage in the noncommercial use of the Pre-1972 Sound Recording without violating section 1401(a).<sup>9</sup> The filing of a Notice of Pre-1972 Noncommercial Use does not affect any limitation on the exclusive rights of a copyright owner described in sections 107, 108, 109, 110, or 112(f) of the Copyright Act, as applied to a claim of unauthorized use of a Pre-1972 Sound Recording.<sup>10</sup>

Under the Classics Protection and Access Act, the Copyright Office has 180 days to issue regulations identifying the “specific, reasonable steps that, if taken by a

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<sup>4</sup> 17 U.S.C. 1401(c)(1)(A).

<sup>5</sup> *Id.* 1401(c)(1)(B).

<sup>6</sup> *Id.* 1401(c)(1)(C).

<sup>7</sup> *Id.* 1401(c)(1).

<sup>8</sup> *Id.* 1401(c)(1)(C).

<sup>9</sup> *Id.* 1401(c)(1).

<sup>10</sup> *Id.* 1401(c)(2)(C).

[noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search” of the Office’s records and commercial services to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited.<sup>11</sup> Once this regulation is promulgated, a user following the “specific, reasonable steps” identified by the Office will be shielded from liability, even if the sound recording is later discovered to be commercially exploited.<sup>12</sup> Other searches may also satisfy the statutory requirement of conducting a good faith search, but the user would need to independently demonstrate how she met the statutory requirement if challenged.<sup>13</sup>

The Office must also issue regulations “establish[ing] the form, content, and procedures” for users to file Notices of Pre-1972 Noncommercial Use and rights owners to file Pre-1972 Opt-Out Notices.<sup>14</sup>

## **II. Subjects of Inquiry**

### *A. Good Faith, Reasonable Search.*

The Copyright Office seeks public input regarding the “specific, reasonable steps” that should be sufficient for a user to undertake to satisfy the requirement to conduct a “good faith, reasonable search” and qualify for the noncommercial use safe harbor.<sup>15</sup>

Requiring a “good faith, reasonable search” to determine whether a work is being commercially exploited is not foreign to copyright law. Under the section 108 exception for libraries and archives, once a published work is in its last twenty years of copyright

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<sup>11</sup> *Id.* 1401(c)(3)(A).

<sup>12</sup> *Id.* 1401(c)(4)(B).

<sup>13</sup> *Id.* 1401(c)(4)(A)–(B).

<sup>14</sup> *Id.* 1401(c)(3)(B), (5)(A).

<sup>15</sup> *Id.* 1401(c)(3)(A), (4)(B).

protection, a library or archives may reproduce, distribute, display, or perform that work, for purposes of preservation, scholarship, or research, provided the institution has determined after “reasonable investigation” that the work is not currently subject to normal commercial exploitation.<sup>16</sup> In addition, the Office has examined “good faith” searches of works in the context of orphan works (*i.e.*, works for which a good faith prospective user cannot readily identify and/or locate the copyright owner(s) in a situation where permission from the copyright owner(s) is necessary as a matter of law).<sup>17</sup> In its 2015 policy study on orphan works, the Office recommended that any limitation on liability for using an orphan work must require, among other things, that users have performed a “good faith, qualifying search to locate and identify the owner of the infringed copyright before the use of the work began.”<sup>18</sup> Similarly, for example, in 2008, the U.S. Senate passed a bill that would have limited liability for the use of orphan works where a user, before making a use, “performed and documented a qualifying search, in good faith, to locate and identify the owner of the infringed copyright.”<sup>19</sup> The bill stated that a qualifying search was one where the user “undertakes a diligent effort that is reasonable under the circumstances to locate the owner of the infringed copy,” which required, at a minimum: “a search of the records of the Copyright Office that are available to the public through the Internet . . .”; “use of appropriate technology tools, printed publications, and where reasonable, internal or external expert assistance”; “use of appropriate databases, including databases that are available to the public through the

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<sup>16</sup> 17 U.S.C. 108(h)(1), (2)(A).

<sup>17</sup> U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 56 (2015), <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf>.

<sup>18</sup> *Id.*

<sup>19</sup> Shawn Bentley Orphan Works Act, S.2913, 110th Cong. sec. 514(b)(1) (as passed by Senate, Sept. 26, 2008).

Internet”; and “any actions that are reasonable and appropriate under the facts relevant to the search, including actions based on facts known at the start of the search and facts uncovered during the search, and including a review, as appropriate, of Copyright Office records not available to the public through the Internet that are reasonably likely to be useful in identifying and locating the copyright owner.”<sup>20</sup>

In this notice of inquiry, the Office seeks practical sources and other information that would allow it to enumerate a list of reasonable steps that a user should undertake as part of a good faith, reasonable search, including services that should be searched. The Office also seeks input on any model methods of search. Specifically:

1. What would constitute a reasonable search of the Office’s database of Pre-1972 Schedules, which will index information including the name of the rights owner, title, and featured artist for each sound recording filed on a schedule?
2. Please suggest specific “services offering a comprehensive set of sound recordings for sale or streaming” that users should be asked to reasonably search before qualifying for the safe harbor.
3. Which criteria should be used to identify music streaming services that should be searched, now and in the future? For example, one publication recently analyzed search requests for music providers, and determined that the most frequently searched services were YouTube Music, Amazon Music, Apple Music, Pandora, and Spotify.<sup>21</sup> Is this a reasonable list, or should the Office consider different and/or additional analytics, such as catalog size, number of listeners, or inclusion

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<sup>20</sup> *Id.* sec. 514(2)(A).

<sup>21</sup> Daniel Sanchez, *We Asked a Search Analytics Company to Tell Us the Most Popular Music Services*, DIGITAL MUSIC NEWS (June 11, 2018), <https://www.digitalmusicnews.com/2018/06/11/most-popular-music-services/>.

into indexes such as Nielsen Music? To that end, Billboard recently added the iHeartRadio subscription stream to various streaming-inclusive charts,<sup>22</sup> and other services, such as SiriusXM, Deezer, Bandcamp, SoundCloud, and Tidal provide music to millions of users.

4. Is it reasonable to expect a user's search to encompass music distribution services, such as CD Baby, TuneCore, or The Orchard?
5. Are there other sources to which the Office should look that may demonstrate commercialization of physical copies of recordings, *e.g.*, vinyl records or compact discs?
6. Are there other specialized services or salesfronts regarding particular genres or eras within the category of Pre-1972 Sound Recordings that should be considered by the Office?
7. How many sources should a user be required to search before qualifying for the safe harbor? In responding, please consider that the Office must promulgate a "reasonable" list of steps, but in a way that does not overlook commercialization of Pre-1972 sound recordings.
8. Please describe specific steps that should constitute a reasonable search for a recording on an identified service. Should the steps be service-specific or would a single list of steps be adequate for any identified source? Is the description of a qualifying search described by the 2008 bill referenced above useful in defining

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<sup>22</sup> Billboard Staff, *Pandora & iHeartRadio Subscription Streams to Be Added to Billboard Charts*, BILLBOARD (June 25, 2018), <https://www.billboard.com/articles/news/8462711/pandora-iheartradio-subscription-streams-added-billboard-charts>.



whether a user has conducted a reasonable search to determine whether a work is being commercially exploited?

*B. Filing of Notices of Pre-1972 Noncommercial Use and Pre-1972 Opt-Out Notices.*

The Office also seeks written comments on how it should “establish the form, content, and procedures” for users to file Notices of Pre-1972 Noncommercial Use and rights owners to file Pre-1972 Opt-Out Notices. Specifically:

1. Should the Office provide guidelines as to what constitutes a “noncommercial” use, and if so, what? In answering, consider that “merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under this subsection does not itself necessarily constitute a commercial use of the sound recording,” and “the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.”<sup>23</sup> For example, should the online use of a work where the user receives website advertising revenue be considered “commercial”? Should a prospective user be asked to disclose whether they are an individual, or whether they will operate as a commercial or noncommercial entity?
2. To what extent should a user be required to specify the nature of the use, such as the expected audience, duration of the use, and whether it will be online or limited to a particular geographic area?
3. How should the user be required to certify or describe the steps taken for a search to constitute a “good faith, reasonable search”? How detailed should

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<sup>23</sup> 17 U.S.C. 1401(C)(2).

any description be? In responding, the Office encourages commenters to consider other forms and procedures offered by the Office, which reflect operational considerations by the Office, as well as the resources described above.<sup>24</sup>

Depending on the feedback received, the Office will either issue an interim rule, or a notice of proposed rulemaking with further request for comment.

**Dated:** October 11, 2018.

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**Regan A. Smith,**  
*General Counsel and*  
*Associate Register of Copyrights.*

**[BILLING CODE 1410-30-P]**

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<sup>24</sup> See, e.g., *Document Recordation: Completing and Submitting Declarations of Ownership in Musical Works*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/recordation/domw/#requirements> (instructions on filing Declarations of Ownership in Musical Works); *Requirements and Instructions for Completing and Submitting Schedules of Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFFICE, <https://copyright.gov/music-modernization/pre1972-soundrecordings/schedulefiling-instructions.html> (instructions on filing Pre-1972 Schedules); *Requirements and Instructions for Completing and Submitting Notices of Contact Information For Transmitting Entities Publicly Performing Pre-1972 Sound Recordings*, U.S. COPYRIGHT OFFICE, <https://copyright.gov/music-modernization/pre1972-soundrecordings/contactinformation-instructions.html> (instructions on filing notices of contact information for transmitting entities publicly performing Pre-1972 Sound Recordings); *Modernizing Copyright Recordation*, 82 FR 52213 (Nov. 13, 2017) (issuing interim rule amending regulations governing recordation of transfers of copyright ownership, other documents pertaining to a copyright, and notices of termination).

